Supreme Court, U.S.
FILED
SEP 11 2015
OFFICE OF THE CLERK

No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Friedman Foundation for Educational Choice, Inc., a 501(c)(3) nonprofit and nonpartisan organization founded in 1996 by Milton and Rose D. Friedman, is dedicated to advancing its founders' vision of school choice for all children. The Friedman Foundation's goal is to advance a K–12 education system in which all parents, regardless of race, origin, or family income, are free to choose a learning environment – public or private, near or far, religious or secular – that works best for them. The Friedman Foundation, a national leader in school choice research, policy development and educational training and advocacy, continues its founders' mission of promoting school choice as the most effective and equitable way to improve K-12 education in the United States.

The Friedman Foundation has an interest in this litigation because California's Agency-Shop law profoundly impairs the ability of parents to choose the best school for their children, regardless of whether that school is public, private, charter, at home or

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[1] Pursuant to Rule 37.3 of the Rules of the Supreme Court, *amicus* certifies that all parties have consented to the filing of this *amicus curiae* brief. Letters of consent to the filing of all *amicus curiae* briefs were filed by each party with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* affirms that no Counsel for a party authored this brief in whole or in part, and no Counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae*, its members, or its Counsel made a monetary contribution to the preparations or submission of this brief.

online. By requiring public school teachers who are not union members to financially support the union's collective bargaining efforts, California law limits the abilities of these educators to exercise their constitutional First Amendment rights to publicly advocate on behalf of students and the greater community. Collective bargaining implicates virtually every current controversy surrounding public education, including class size, school budgets, merit pay, and student testing. The public has an interest in hearing from all sides of this debate, not just that of unions. Thus, the issues raised in this appeal are central to the mission of the Friedman Foundation.

SUMMARY OF ARGUMENT

The right to petition government for redress of grievances is inherent in the "very idea" of a "republican" form of government. *See BE & K Constr. Co.* v. *NLRB*, 536 U.S. 516, 524 (2002). It is the foundation for every other right, since the safeguards against governmental intrusion into individual liberties would have little meaning without the ability to petition the government to redress such grievances. *Borough of Duryea* v. *Guarnieri*, 131 S. Ct. 2488, 2500 (2011).

When public employee unions take positions in collective bargaining negotiations, and present contracts for ratification by legislative bodies, they petition elected officials to dictate public policy priorities, including how to order and set public spending. It is constitutionally impermissible to force employees who disagree with the unions' priorities to finance union petitioning efforts. Such forced petitioning interferes with those employees' right to

themselves petition the government as to their positions vis-à-vis government priorities.

Public employee collective bargaining is, by design, an effort to sway elected officials to "accede to a union's demands" as to a "wide variety" of "ideological" or politically controversial issues, such as the "right to strike," the contents of an employee "medical benefits plan," and the desirability of "unionism itself." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222, 228 (1977). Legislative deliberation over public employee contracts requires elected officials to balance competing policy concerns, fiscal priorities, and political considerations in discharging their nondelegable duty to allocate finite sums of public wealth. Even legislative decisions over "prosaic stuff," like "wages, benefits, and such," *Harris* v. *Quinn*, 134 S. Ct. 2618, 2655 (2014) (Kagan, J. dissenting), are often not only matters of public concern, but of substantial public debate. These "'bread and butter' issues" "have a direct impact on the level of public services, priorities within state and municipal budgets, creation of bonded indebtedness, and tax rates." *Abood*, 431 U.S. at 258 (Powell, J., concurring).

In the four decades since *Abood* was decided, public debate about public education has undergone profound change. Charter schools, the Common Core, No Child Left Behind, and pension reform were not topics of discussion, let alone front-and-center political issues, when the constitutionality of agency-shop provisions in the collective bargaining agreement between the Detroit Board of Education and the Detroit Federation of Teachers was decided. *Id.* at 212. These issues are now of the utmost ur-

gency, and not just in the City of Detroit. Similar perils face teachers in the State of California, as exemplified by the warning in 2011 that "[a]bsent a bailout by the California Legislature, the prospect of insolvency is very real at the California State Teachers' Retirement System." State of Cal. Little Hoover Comm'n, Public Pensions for Retirement Security 26 (Feb. 2011), http://www.lhc.ca.gov/studies/204/Report204.pdf.

California law recognizes the public's right to petition the legislature as to the terms of collective bargaining agreements, and gives its citizens the opportunity to weigh in on the negotiation and approval of contracts between teachers' unions and school districts. But for non-union members, this opportunity is illusory. California's Agency-Shop provision compels public employees to underwrite the petitioning activities of the unions, whether or not they agree with the positions taken by the unions. Any educator wishing to publicly speak out against a collective bargaining agreement is forced to finance his or her own opposition. Dissenters who wish to be heard compete against the unions' forcibly-sponsored megaphone, which drowns out any competing voices, including their own, and which is the only voice heard in the closed bargaining sessions.

In no other context has this Court allowed a state to compel its citizens to finance petitioning efforts in support of legislation which they oppose. To the contrary: This Court has long recognized that government may not compel speech, *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943), associational activities, *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984), or support for a political party,

Elrod v. *Burns*, 427 U.S. 347, 372 (1976). The right to petition carries with it the corollary restraint on compelled petitioning efforts, just as freedom of speech includes "right to refrain from speaking at all," *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and freedom of association grants the adjunct right not to associate, *Roberts*, 468 U.S. at 623.

Abood's "uncommon interference" with individuals' expressive activities is severe where agency fees are, by statute, deducted from employees' salaries without employee authorization or otherwise required to be paid directly to the union. *Harris*, 134 S. Ct. at 2645; *see also* Cal. Educ. Code § 45061 (West 2006). The fees are not limited to the cost of negotiation and contract administration, but "may include costs of union lobbying targeted to fostering collective bargaining negotiations and contract administration or to securing benefits for union members outside the collective bargaining process." FRANK KEMERER & PETER SANSOM, CALIFORNIA SCHOOL LAW 158-59 (3d Ed. 2013); *see also* Cal. Gov't Code § 3546 (West 2010). Thus, under California's Agency-Shop provision, it is the "Government [that] steps in to force people to help espouse the particular causes of a group." *Harris*, 134 S. Ct. at 2630 (quoting *Int'l Ass'n of Machinists* v. *Street*, 367 U.S. 740, 796 (1961) (Black, J., dissenting)).

As a practical matter, compulsory fees compel association with unions, whether or not public school teachers share the political or economic agenda of their bargaining representatives; as the agency fee is a large portion of what a regular union member pays, "it is not uncommon for feepayers to decide to

join the union so that they have a voice in union affairs." KEMERER & SANSOM, *supra*, at 159.

California's Agency-Shop provision violates the fundamental petitioning rights of non-union members and those who are effectively forced into an association where the alternative is to have no voice at all in the bargaining process. The Court should thus strike down the Agency-Shop provision as unconstitutional.

ARGUMENT

California's Educational Employment Relations Act ("EERA") permits a union to become the "exclusive representative" of public school employees within a school district. Cal. Gov't Code § 3544(a) (West 2010). Once certified, the EERA allows for mandatory payment of "service fee[s]" from non-union member educators. *Id.* § 3546(a). This fee "cover[s] the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative." *Id.* Under the EERA, an "employee organization" includes not only the bargaining agent, but also those authorized to act on its behalf. As local teacher unions utilize the services of the California Teachers Association ("CTA") and its national affiliate, the National Education Association ("NEA"), in representing their members, payment to these state and national organizations is part of chargeable fees collected from all public school teachers, regardless of union membership. Accordingly, California law not only grants unions a monopoly over the negotiation process, but also empowers them to force non-members to fund union efforts

to obtain government approval of their demands. This violates the Petition Clause of the First Amendment.

I. THE RIGHT TO PETITION THE GOVERNMENT IS A FUNDAMENTAL FIRST AMENDMENT RIGHT.

The First Amendment protects not only "freedom of speech," but also "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const., Amdt. 1. Though "the right to speak and the right to petition are 'cognate rights'" and "share substantial common ground," they are importantly distinct. *Guarnieri*, 131 S. Ct. at 2494-95 (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)); *see also id.* ("A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns."). The right to speak is concerned with the *nature* of expressive conduct; the right to petition is concerned with the *process* of expression to public officials.

A. The Right To Petition Is Fundamental To The Democratic Process.

The right to petition is "integral to the democratic process" as it "allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Guarnieri*, 131 S. Ct. at 2495. As this Court has explained, "the right is implied by the very idea of a government, republican in form" and is thus "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co.*, 536 U.S. at 524-25 (internal quotations

and alterations omitted). Indeed, "[t]he right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." *Guarnieri*, 131 S. Ct. at 2500.

B. This Court Has Long Protected The Right To Petition.

This Court has not hesitated to safeguard the freedom to petition where, as here, a private party has tried to use state power to impinge upon the protected activities of others. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, this Court held that, under the Petition Clause, an antitrust suit may not be "predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. 127, 135 (1961). This Court has also repeatedly invoked the Petition Clause to protect workers' rights to petition before courts and legislatures. *See, e.g., United Mine Workers of Am., Dist. 12* v. *Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (invoking the Petition Clause in reversing an injunction prohibiting a union from hiring a lawyer to prosecute workers' compensations claims); *Thomas*, 323 U.S. at 530 (invoking the Petition Clause in striking down law requiring union officials to obtain a permit before soliciting members).

C. Compelled Funding Of Union Petitioning Violates The Petition Clause Of The First Amendment.

Similarly, forcing citizens to fund petitioning activity against their will violates the First Amend-

ment. In 2011, this Court held that the principles governing the free speech rights of public employees are the same as those governing the petitioning rights of public employees. *See Guarnieri*, 131 S. Ct. at 2500 ("The framework used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right."). Just as freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley*, 430 U.S. at 714, the right to petition must also include the right *not to petition*.

The right to be free from compelled petitioning is arguably *more* essential to overall liberty than is the right to be free from compelled speech. The enacting of law, unlike the expression of an opinion, has long term coercive effects. Teachers who are forced to support the ratification of a collective bargaining agreement will ultimately be forced to abide by the terms of that very agreement. In the words of Thomas Jefferson, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). It is even more tyrannical to force someone to contribute money to enact laws of which he disapproves. This is precisely what California's Agency-Shop provision does.

II. COLLECTIVE BARGAINING CONSTITUTES PETITIONING SUBJECT TO FIRST AMENDMENT PROTECTION.

A. Collective Bargaining In The Public Sector Is, By Its Nature, First Amendment Petitioning Activity.

This Court has defined the term "petition" broadly: "A petition conveys the special concerns of its author to the government and, in its usual form, requests action by the government to address those concerns." *Guarnieri*, 131 S. Ct. at 2495. "[T]he right to petition extends to all departments of the Government." *See Cal. Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). This right thus grants citizens the freedom to "use the channels and procedures of state and federal agencies and courts [and legislatures] to advocate their causes and points of view." *Id.* at 511; *see also Noerr Motor Freight, Inc.*, 365 U.S. at 135 (noting petitioning includes "attempts to influence the passage or enforcement of laws").

The effort of public employee unions to negotiate and then obtain legislative approval of collective bargaining agreements clearly constitutes petitioning under this Court's broad definition. Collective bargaining agreements in the public sphere differ from contracts between private parties in that they require ratification by a majority vote of elected officials. *See* Daniel M. Rosenthal, *Public Sector Collective Bargaining, Majoritarianism, and Reform*, 91 Or. L. Rev. 673, 696 (2013) (noting that the implementation and funding of collective bargaining agreements in the public sector require approval of

"a school board, city council, or local government equivalent"). And these collective bargaining agreements determine important matters of government policy. In the education context, collective bargaining agreements between teachers' unions and school districts may set "wages, hours, teacher assignment, pension and healthcare benefits, teacher preparation time, and class size," all matters of public concern. William S. Koski, *Teacher Collective Bargaining, Teacher Quality, and the Teacher Quality Gap: Toward A Policy Analytic Framework*, 6 Harv. L. & Pol'y Rev. 67, 71 (2012).

Collective bargaining in the public sphere also involves political tradeoffs. For example, government resources expended to pay teacher salaries necessarily impact state funds available for other services, such as law enforcement, fire protection, or sanitation. *See* Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 Ohio St. J. Crim. L. 525, 567 (2013) (noting that "[a]llocating public resources is . . an intensely political process" in which the "[g]overnmental functions with the widest and most intense political support . . . are the least likely to be denied resources"). This is particularly true today as cash-strapped state and local governments are increasingly forced to lay off or furlough workers in the face of shrinking budgets. *See* David Leonhardt, *Private Jobs Have Recovered. Government Jobs Still Lag*, UpShot (June 6, 2014), http://www.nytimes.com/2014/06/07/upshot/private-jobs-have-recovered-government-jobs-still-lag.html?_r=0 (noting that "[m]any state and local governments cut jobs sharply to deal with budget deficits during the recession"). Collective bargaining

agreements between school districts and teachers impact not only education policy, but other realms of public concern.

Legislative actions which approve or reject collective bargaining agreements are functionally indistinguishable from other forms of political decisions made by elected officials, whether they involve the expenditure of public funds, the allocation of finite resources, or the grant of any exclusive franchise or monopoly right. "The collective-bargaining agreement to which a public agency is a party is not merely analogous to legislation, it has all of the attributes of legislation for the subjects with which it deals." *Abood*, 431 U.S. at 252-53 (Powell, J., concurring). Hence, this Court has likened collective bargaining agreements "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to utility schedules of rates and rules for service." *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 335 (1944).

Such agreements necessarily "use the channels and procedures of state" and government bodies in a fundamental way. *See Cal. Motor Transp. Co.*, 404 U.S. at 511. It is therefore undeniable that union efforts to negotiate and seek government approval of collective bargaining agreements (along with any opposition to those efforts) constitute petitioning under the First Amendment.

B. California Law Demonstrates That Collective Bargaining Is A Political Process.

California law highlights the ways in which collective bargaining is a political and ultimately a

legislative process. California law ensures that government approval of collective bargaining agreements between teachers' unions and local school authorities is subject to democratic deliberation and public oversight. It is the express intent of the EERA's collective bargaining provisions "that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives." Cal. Gov't Code § 3547(e) (West 2010); *see also San Mateo City Sch. Dist.* v. *Pub. Emp't Relations Bd.*, 663 P.2d 523, 532 (Cal. 1983) ("The EERA recognizes the importance of public participation in decisions affecting the educational process even [with respect] to [collective bargaining] matters.").

To this end, the EERA mandates that initial collective bargaining proposals by a teachers' union or school district "shall be presented at a public meeting . . . and thereafter shall be public records." Cal. Gov't Code § 3547(a). The EERA further prohibits the union and school district from entering into negotiations "until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself[.]" *Id.* § 3547(b). Only then may the school district, "at a meeting which is open to the public, adopt its initial proposal." *Id.* § 3547(c). Finally, the public again has the right to weigh in at the ratification stage. Before a district may enter into an agreement with the union, "the major provisions of the agreement," including the costs that

would be incurred by the district, must "be disclosed at a public meeting." *Id.* § 3547.5(a).

Crucially, the school district retains "the final decision as to the terms of the negotiated agreement," and school districts are governed by elected boards. *See United Teachers of L.A.* v. *L.A. Unified Sch. Dist.*, 278 P.3d 1204, 1209 (Cal. 2012). Without question, the process of debate and ratification can be a politically contentious affair. In 2011, the Beverly Hills School Board rejected a proposed agreement "[c]iting concerns over a proposed new school calendar and increased class sizes." Laurie Land, *BHUSD Board Rejects Proposed Teacher Contract*, Beverly Hills Patch, June 30, 2011.[2]

The political nature of collective bargaining is further underscored by the fact that school board elections have become multi-million dollar contests. This year's election for the four open seats on the seven-member Los Angeles Unified School District ("LAUSD") is only one such example. *See* Howard Blume, *Spending in race for three LAUSD board seats reaches nearly $4.6 million*, L.A. Times, May 15, 2015;[3] L.A. City Ethics Comm., 2015 City and LAUSD Elections (noting candidate spending of $1.2 million and independent expenditures of $5.1 million).[4]

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[2] Available at http://patch.com/california/beverlyhills/bhusd-board-rejects-proposed-teacher-contract.

[3] Available at available at http://www.latimes.com/local/education/la-me-lausd-election-money-20150515-story.html.

[4] Available at http://ethics.lacity.org/disclosure/campaign/totals/public_election.cfm?election_id=50.

LAUSD board members serve four-year terms with elections in odd-numbered years. Negotiating positions for union contracts on both sides are necessarily influenced by the political composition of the board, and the priorities set in those negotiations are enmeshed with the electoral processes that determine who sits on the board. As such, various interest groups, including unions, expend significant resources on school board elections: the policy stakes are substantial.

The explosion in school board campaign expenditures is all the more remarkable when juxtaposed with the shrinking pool of public resources to be divvied up by these elected officials. California's capacity to provide public services is deteriorating and its public workforce is declining due to strained state budgets. California faces a multi-billion dollar shortfall, estimated at $378.8 billion in 2010, in state pensions for public employees alone. *See* Stuart Buck, *Trouble Brewing: The Disaster of California State Pensions*, (The Found. for Educ. Choice, Indianapolis, Ind.), Oct. 2010, at 7.[5] These shortfalls are, in part, the result of union lobbying efforts to increase pension benefits. *See id.* at 13.

These painful fiscal realities require the most difficult political and budgetary trade-offs. Under the California Constitution, charter cities have "plenary authority" to determine the "compensation" of their officers and employees. Cal. Const., Art. XI, § 5(b)(4); *see also Sonoma Cty. Org. of Pub. Emps.* v.

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[5] Available at http://files.eric.ed.gov/fulltext/ED517459.pdf.

Cty. of Sonoma, 591 P.2d 1, 12 (Cal. 1979). The exercise of that plenary authority may, at times, require elected officials to reject bargaining proposals, or to refuse to ratify collective bargaining agreements, as a matter of economic self-preservation. The approval process of public employee contracts by elected state officials is not only intensely political; it is also subject to the non-delegable power of these officials to set the wages and benefits of public employees. *Cf. Stone* v. *Mississippi*, 101 U.S. 814, 817 (1880) ("[T]he legislature cannot bargain away the police power of a State.").

Thus, in California, the collective bargaining process necessarily involves petitioning activity concerning the exercise of essential attributes of municipal sovereignty – the "plenary authority" to provide for the "compensation" of their officers and employees.

III. CALIFORNIA'S AGENCY-SHOP LAW CONSTITUTES AN UNCONSTITUTIONAL INTERFERENCE ON THE PETITIONING RIGHTS OF THE PUBLIC AND NON-UNION WORKERS.

A. Forcing Non-Union Members To Subsidize Union Collective Bargaining Constitutes A Significant Infringement Of Their Petitioning Rights.

California's Agency-Shop provision constitutes a substantial limitation on the right of non-union teachers to petition their government. A teacher who opposes a union's collective bargaining proposal is nonetheless required to fund the union's efforts to

seek government ratification of that very proposal. This gives the union, which possesses a monopoly over the negotiating process, an extraordinary advantage in the political process as well – one that it is able to secure through state coercion.

The union's exclusive representation gives it an extraordinary power, not just to speak for and bind all employees, but to compel agreements based on negotiations with the public entity which gave it monopoly control over the most essential matters of the workers' professional lives. Because petitioners cannot express their contrary views in collective bargaining negotiations, the state simultaneously "strips minorities within the craft of all power of self-protection," *Graham* v. *Bhd. Of Locomotive Firemen*, 338 U.S. 232, 238 (1949), and compels them to finance the political discourse between the union and the state. While non-union members, along with rest of the public, have the opportunity to express their views on any proposed collective bargaining agreement, this does not mitigate the union's coercive advantage. Under California's Brown Act, the legislative body of a local agency may meet in closed session "for the purpose of reviewing its [negotiating] position and instructing the local agency's designated representatives." Cal. Gov't Code § 54957.6(a) (West 2010). For all practical purposes, the only opportunity for public comment is after the negotiations are concluded, and the governing board has indicated its intention to approve the agreement it reached with the union. No other advocacy group can suppress dissent in this way, let alone wield a grant of public rights (as is the certification of union exclusivity) to achieve these ends.

B. Agency-Shop Provisions Significantly Impinge Upon The Public's Petitioning Right.

This legislative scheme additionally infringes on the rights of the general public. "[T]he public has a right to the benefit of [public] employees' participation in petitioning activity." *Guarnieri*, 131 S. Ct. at 2500. Specifically, "[p]etitions may 'allow the public airing of disputed facts,'" and contribute to the development of the law. *Id.* (quoting *BE & K*, 536 U.S. at 532); *see also Schuette* v. *Coal. to Def. Affirmative Action*, 134 S. Ct. 1623, 1636-37 (2014) ("Our constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times . . . ."). However, "these and other benefits may not accrue if one class of knowledgeable and motivated citizens is prevented from engaging in petitioning activity." *Guarnieri*, 131 S. Ct. at 2500. Such is the case here. Non-union member teachers have little chance of affecting the political process when they are forced to fund the other side (and therefore have little incentive or resources with which to try).

California's restriction on non-members' petitioning activities is particularly troubling where "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent." *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 572 (1968). Non-member teachers are specifically and uniquely positioned to provide an essential counterbalance to the union during public deliberations over proposed collective bargaining

agreements. Certainly these points of view are relevant as to, among other considerations, whether a union's negotiation positions are calculated to protect the perquisites of incumbency rather than to advance the needs of our public schools. *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) ("[I]t is difficult to assume that the incumbent union has no self-interest of its own to serve by perpetuating itself as the bargaining representative.") (citation omitted).

C. No Compelling State Interest Justifies Interfering With Non-Union Members' Right To Petition.

California's Agency-Shop provision thus burdens a core First Amendment right. To be constitutional, it must be "narrowly tailored" to achieve a "compelling" state interest. *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). It is not.

While a public employee's right to petition government is not without limitation, this Court has never expressly held that a state may interfere with an employee's right to advocate (or not advocate) in favor of policies before a law making body. In *Guarnieri*, this Court recognized that a state's need to provide an efficient and effective workplace may justify limiting an employee's ability to claim protection for the filing of an employment grievance under the Petition Clause. 131 S. Ct. at 2496. Such efficiency concerns could never justify interfering with an employee's right to participate in the democratic process. Nor must a public employee be required to bargain away fundamental associational or petitioning rights as the price for public employment. *See Connick* v. *Myers*, 461 U.S. 138, 147 (1983). "When a

public employee seeks to participate, as a citizen, in the process of deliberative democracy, either through speech or *petition*, 'it is necessary to regard the [employee] as the member of the general public he seeks to be.'" *Guarnieri*, 131 S. Ct. at 2500 (emphasis added) (quoting *Pickering*, 391 U.S. at 574); *see also id.* ("The government may not misuse its role as employer to unduly distort [the public] deliberative process.").

Once the petitioning implications of agency-shop provisions are considered, it becomes clear that compulsory financing of collective bargaining violates the Petition Clause even under *Abood's* own framework. The majority in *Abood* held that the state may not compel contributions to fund a union's "advancement of . . . ideological causes not germane to its duties as collective-bargaining representative" – such as a union's campaign contributions to political candidates or its political speech unrelated to collective bargaining negotiations. 431 U.S. at 235; *see also Knox* v. *Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2294 (2012) ("[W]e have never held that the First Amendment permits a union to compel nonmembers to support . . . political activities."). As discussed above, collective bargaining in the public employment context inextricably involves petitioning to a government entity. It is thus *itself* a political activity. *Abood*, 431 U.S. at 252-53 (Powell, J., concurring).

The majority in *Abood* reasoned that, for First Amendment purposes, there was no real difference between private sector unions and public sector unions in the context of collective bargaining. *Id.* at 232. The Court acknowledged a "political" dimen-

sion to collective bargaining in the public sphere, but concluded that "[t]he union security issue in the public sector . . is fundamentally the same issue . . as in the private sector. . . . No special dimension results from the fact that a union represents public rather than private employees." *Id.* (internal quotations omitted). Collective bargaining in the public sphere was found only distinguishable in that the employer happens to be the government. *See id.* at 230 ("The uniqueness of public employment is . . . in the special character of the employer.").

Yet, it is petitioning activity which distinguishes this public decision-making process from private collective bargaining. In California and elsewhere, labor negotiations in the public sector are not "bilateral process[es]," as are private sector negotiations. *San Mateo*, 663 P.2d at 532. In the public sector, an agreement may not simply be put into effect upon employer and employee consent. Rather, the agreement must first be ratified through the political process. With respect to California public schools, this means that the public must have an opportunity to weigh in, and the requisite government authority must give its final approval via a majority vote of its governing body.

Outside of the public school context, under California's Meyers-Milias-Brown Act, "[i]f a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting." Cal. Gov't Code § 3505.1 (West 2010 & Supp. 2015).

If no agreement is reached, the governmental body has the authority to unilaterally implement its last best and final offer. *Id.* § 3505.7 (West Supp. 2015). This agency-retained power underscores the non-delegable and political nature of the powers governing bodies retain to accept, reject, or *impose* proposed terms and conditions in contracts with their own employees.

While this Court has ruled that a state may compel association for the commercial purposes of engaging in private sector collective bargaining, *Roberts*, 468 U.S. at 638 (O'Connor, J., concurring), public employee contract negotiations are not a "commercial" endeavor. *Abood* distinguishes public and private employer collective bargaining based in part on the absence of market forces, *i.e.*, a public employer "lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases." 431 U.S. at 228. What "disciplines" legislative bodies are the competing demands on the municipality's or school board's budget, its long-term pension or debt obligations, its ability to raise revenue and sustain its tax base, as well as the "blend of political ingredients" which may account for their election, or – depending on the positions taken in contract negotiations –their defeat at the polls. These "political ingredients" are shaped through petitioning activities at the core of the negotiation of these agreements. In the end, it is the public – including the non-member teachers – who must foot the bill.

Collective bargaining over teacher contracts involves petitioning with enormous political conse-

quences. No constitutional justification exists for the State of California's interference in this process.

D. This Case Affects The Petitioning Rights Of All Public Workers.

The constitutional implications of this case extend far beyond California or teachers' unions.

The state and local governments violate the petitioning rights of public school teachers in any jurisdiction where collective bargaining is subject to the democratic political process, and non-union members are forced to contribute to a union's collective bargaining efforts. This is true throughout much of the United States. Nearly half of all states permit agency-shop arrangements. *See* Lieutenant Colonel Kenneth Bullock, *Official Time As A Form of Union Security in Federal Sector Labor-Management Relations*, 59 A.F. L. Rev. 153, 159 (2007) (noting that "[t]he agency shop is . . . permitted for at least a portion of the public workforce in nineteen states and the District of Columbia"). In virtually all jurisdictions, a government entity – often a democratically elected school board – must ratify a public education collective bargaining agreement before it may go into effect. *See* Rosenthal, 91 Or. L. Rev. at 724, 724 n.101 (noting that public collective bargaining agreements must be ratified by a public entity, often a democratically elected school board).

Government interference with the petitioning rights of public employees is not limited to public education employees. For example, in California, the State may compel all public employees to pay agency fees to support union collective bargaining efforts. Cal. Gov't Code §§ 3508.5(b) (West 2010),

3513(k) (West 2010 & Supp. 2015). Just as in the education context, collective bargaining agreements for all public workers require government approval. *See, e.g., Bldg. Material & Constr. Teamsters' Union v. Farrell*, 715 P.2d 648, 656 (Cal. 1986) (noting that, "although [California law] mandates bargaining about certain matters, public agencies retain the ultimate power to refuse to agree on any particular issue"). Indeed, at the state level, any collective bargaining agreement may necessitate approval by the California Legislature. Cal. Gov't Code § 3517.5 (West 2010 & Supp. 2015). Thus, California public workers in every field can be forced to subsidize the petitioning activities of unions which they oppose.

This case has far-reaching constitutional implications for the petitioning rights of all public workers. Unless this Court intervenes, states will continue to force public workers to support the enactment of policies and legislation against their will. This practice cannot be reconciled with the First Amendment or this Court's jurisprudence.

CONCLUSION

For the foregoing reasons, California's Agency-Shop provision violates the Petition Clause of the First Amendment. The Court should accordingly hold that California's Agency-Shop provision is unconstitutional.

Respectfully submitted,

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Dated: September 11, 2015